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NO. 58200-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ENVER MEŠTROVAC,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE APPEALS,

Appellants/Cross-Respondents.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT ENVER MEŠTROVAC

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I. INTRODUCTION

The Department of Labor & Industries (hereafter, the Department) responded to Mr. Meštrovac's arguments supporting his cross-appeal and to his request for attorney's fees on appeal. This brief is submitted in reply to the Department's response.

II. ARGUMENT

One of the issues raised by Mr. Meštrovac, namely the Department's failure to incorporate fully Mr. Meštrovac's paid holiday and vacation time in calculating his wages, has already been adequately briefed and need not be addressed at length.

The holiday and vacation pay issue is controlled by *Fred Meyer v. Shearer*, 102 Wn. App. 336, 8 P.3rd 310 (2000). This case supports Mr. Meštrovac and was brought to the court's attention in his opening brief.

Further discussion of this issue would involve needless repetition and is unnecessary. Instead, the remainder of this brief will be devoted to three matters:

1. Whether the Department erred in calculating Mr. Meštrovac's wages by omitting the 50% hourly bonus rate paid to him for the regular overtime work required to do his job.

2. Whether the Department should have incorporated the employer's payments for governmentally mandated employee benefit programs – Social Security, Medicare, Industrial Insurance, and Unemployment Compensation – in calculating Mr. Meštrovac's wages.

3. Whether Mr. Meštrovac is entitled to an award of attorney's fees if he prevails on appeal on any issue.

A. The Department Undercalculated Wages By Omitting Part of the Wages Mr. Meštrovac Received For Work Required To Do His Job.

Economist Robert Moss testified non-English speaking persons come to this country at a significant economic disadvantage in the labor market.[1] Mr. Meštrovac, like other non-English speaking recent immigrant workers, began work in this country in an entry level position, with low hourly pay,

[1] CABR [Certified Appeal Board Record] August 6, 2004, testimony on pp. 32-33.

doing dangerous and back-breaking physical labor.[2] Mr. Meštrovac's job, removing hundreds of boxes from shipping containers by hand, required him to work until containers were completely empty, requiring working over 8 hours in a day.

The overtime pay issue revolves around the wages Mr. Meštrovac regularly received for that required overtime work. Those figures, readily available in the Board Record, show Mr. Meštrovac received pay incorporating a 50% overtime bonus.[3]

The statute on wages, RCW 51.08.178, contains ambiguities. RCW 51.08.178(1) requires compensation be based on wages the worker received from "all employment" while also saying "wages" shall not include "overtime pay" unless seasonal or intermittent under subsection (2). Either all wages received are included or overtime wages are excluded. Under RCW 51/08.178(3), all "bonus" moneys paid are

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[2] CABR, August 6, 2004, pp. 214-222. Mr. Meštrovac had the equivalent of one year of high school education and no English when he and his family came to the United States as political refugees. Mr. Meštrovac obtained employment through a relief organization. His work involved removing hundreds of boxes weighing 20-130 kilograms [44-286 pounds] from shipping containers by hand.

included in wages. Thus, RCW 51.08.178(1), (2) and (3) are ambiguous at best and require interpretation.

Statutes in the Act must be interpreted in light of the statement of intent set forth in RCW 51.12.010:

> for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . occurring in the course of employment.

The Department paid Mr. Meštrovac the minimum benefit, not crediting him for supporting his parents and minor brother.[4] To reduce Mr. Meštrovac's "economic loss suffered" "to a minimum," the bonus he received for overtime work should be included in wage calculations, to support his family of four. This interpretation is required by Washington cases requiring interpreting ambiguity in favor of the worker.[5]

The Department's interpretation and application of RCW 51.08.178 resulted in differential treatment of the hourly bonus

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[3] See CABR Admitted Exhibit 37. Moss testified pay stubs for the year before injury show 4.81 overtime hours per pay period. August 6, 2004, p. 37, l. 7-15.

[4] The Department calculated and paid Mr. Meštrovac's benefits at the minimum rate of 60% of his wages under RCW 51.32.090(1) and RCW 51.32.060(1)(g) considering him as unmarried and without dependents.

paid for overtime work[6] favoring the Department and, at the same time, favoring predominantly English-speaking salaried workers over lower paid hourly workers like Mr. Meštrovac – those most in need of benefits.

All salaried workers' pay [whether bonus or salary] is included in wage calculations. The Department's calculation of wages omitted the 50% hourly bonus paid Mr. Meštrovac for his regular overtime work from his wage calculations.[7] This interpretation increased Mr. Meštrovac's "economic loss" contrary to RCW 51.12.010 -- just as the Department's denial of interpreter services did by imposing on him interpreter costs necessitated solely by his industrial injury.

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[5] *Mackay v. DLI*, 181 Wn. 702, 704, 44 P.2d 793 (1935); *Cockle v. DLI,* 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

[6] The Department's application of RCW 51.08.178(1) calculated Meštrovac's wages based on all hours he worked, but excluded from calculations the 50% hourly bonus rate paid for his overtime work, inconsistent with RCW 51.08.178(2)'s apparent exclusion of overtime pay from wages unless employment is (a) "exclusively seasonal" or (b) "essentially part-time." Under principles of statutory interpretation, this ambiguity should have been construed in Mr. Meštrovac's favor by including all his pay, regular and his bonus for overtime work, in wage calculations under subsection (1).

[7] CABR, Admitted Exhibit 37 shows Mr. Meštrovac's pay rate as $9.00/hour, and the 50% hourly bonus paid for overtime work.

B. EMPLOYER PAYMENTS FOR GOVERNMENTALLY MANDATED EMPLOYEE BENEFIT PROGRAMS SHOULD BE INCLUDED IN WAGE CALCULATIONS.

The Department argues it properly excluded employer payments for all governmentally mandated employee benefit programs, including Unemployment Compensation, in reliance on this court's decision in *Erakovič v. Department of Labor & Industries,* 132 Wn.App. 762, 134 P.3d 234 (2006).

In *Erakovič*, the issue was whether Ms. Erakovič's employer's payments made to governmentally mandated benefit programs on her behalf should be included in calculating her wages. The *Erakovič* court ruled against Ms. Erakovič, offering the following rationale:

> Employer payments to government programs such as Social Security, Medicare, and Industrial Insurance are not wages because they are not consideration an employee receives from his or her employer. Even if they were, Erakovic [sic] was not receiving benefits from these programs at the time of her injury, and she fails to explain how the payments were critical to her health and survival at that time.

It is questionable whether the foregoing rationale is still viable after the Supreme Court's recent decision in *Department of Labor & Industries v. Granger*, ___ Wn.2d ___, ___P.3rd___ (Supreme Court No. 78139-7, March 1, 2007). In *Granger,* the injured worker's employer paid into a health care trust fund for the benefit of the worker who, at time of his injury, was not yet eligible for health care benefits. The question before the court was whether the employer's payments to the trust should have been included in calculation of the worker's wages. The opposing arguments were summarized by the court as follows:

> The Department argues that because Granger was not eligible to receive the benefits of that trust at the time of his injury, the payments made to the trusts should not be included in the calculation. Granger argues that because his employer was paying $2.15 per hour to the trust in return for Granger's work, that amount represents his earning capacity at the time of his injury and thus should be included in the calculation.

The Supreme Court rejected the Department's arguments, and ruled in favor of the injured worker, stating: "We agree with Granger and affirm the Court of Appeals."

It is readily seen that the *Granger* opinion undercuts this court's rationale in the *Erakovi*ć case. In *Erakovi*ć, this court emphasized that the injured worker was not receiving Social Security or Medicare benefits "at the time of her injury" and that she failed to show how these benefits were critical to her "at that time." *Granger* rejected this reasoning.

The *Granger* court made it clear it is only necessary to show that the employer's payments on behalf of the worker were being made at the time of injury. Simply put, whether the worker received benefits secured by the employer's payments at the time of the injury was deemed irrelevant.

The Department may argue that *Erakovi*ć was only partially overruled by *Granger*, because the *Erakovi*ć court did not rely solely on the rationale that was rejected in *Granger*. The *Erakovi*ć court also asserted the employer's payments were not "consideration."

Any such argument fails, because the court in *Granger* expressly treated the question of "consideration" as inseparable

from the central issue in the case. The court stated:

> Although the parties ask us to construe the meaning of "receiving at the time of the injury," the disagreement also requires us to determine what constitutes "consideration": the payments to the trust, or the coverage itself.

In *Granger*, the court ruled the employer's payments reflected the injured worker's earning capacity and, thus, must be included when calculating wages. In so doing, the court necessarily determined that the employer's payments into the trust constituted "consideration."

The employer's payments for benefits made on behalf of the worker in *Eraković* were no less "consideration" than the payments for health care benefits made on behalf of worker in *Granger*. In short, both reasons given by the *Eraković* court for its decision were considered and rejected by the court in *Granger*. *Eraković* has been effectively overruled by the Supreme Court's ruling in *Granger*.

In *Eraković*, the court specifically refused to address Ms. Eraković's claim that the employer's contributions to

Unemployment Compensation made on her behalf should be included in wages, leaving open whether those contributions should be considered "wages."[8]

The Board Record here shows that Unemployment Compensation benefits are viewed by the Washington State Employment Security Department as benefits provided by employers for their employees.[9]

Other than the reasoning set forth in *Erakovič*, there is no Washington authority for rejecting Mr. Meštrovac's contention that his employer's payments for Unemployment Compensation benefits should be included in the his wage determination. The employer's payments were made on Mr. Meštrovac's behalf in consideration of Mr. Meštrovac's work. These employer payments provided a crucial benefit for Mr. Meštrovac and his family in the event of his future unemployment. Without those benefits, Mr. Meštrovac and his dependent mother, father, and

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[8] *Erakovič*, *supra*, at 775. See also *Erakovič, supra*, fn. 41.
[9] See CABR Admitted Exhibit 12, Employment Security Department's reference to "Unemployment benefits paid to your former employees."

minor brother could easily be rendered helpless and completely without the means of survival due to a reduction in force or any other circumstance beyond his control.

It is undeniable that the employer made Unemployment Compensation, Social Security, Medicare, and Industrial Insurance payments on Mr. Meštrovac's behalf at the time of his injury. It is also undeniable that those payments were made only because Mr. Meštrovac performed work for the employer.[10] Under *Granger*, these employer payments should therefore be treated as reflecting Mr. Meštrovac's lost earning capacity, even though he was not receiving Unemployment Compensation, Social Security, Medicare, or Industrial Insurance benefits on the date on which he was injured.

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[10] Mr. Meštrovac's employer, a company known as "A-America," told its employees that Social Security, Medicare, and Industrial Insurance are "legally mandated benefits" made available to employees by virtue of their employment by the company. See the company's employee handbooks, Admitted Exhibit 8, page 121 and Admitted Exhibit 9 at page 121, CABR. Note that the company refers to Industrial Insurance as Worker's Compensation.

Three other points should be considered by this court. First, the payments made on behalf of Mr. Meštrovac had value to him, just as the payments made by the employer had value to the injured worker in *Granger*. The court in *Granger* stated:

> Eligibility depended upon banking hours, and when he became injured, Granger lost the ability to bank those hours; therefore the hourly payment by his employer did have value to him.

Mr. Meštrovac's eligibility for Unemployment Compensation benefits, like the worker's eligibility for health care benefits in *Granger*, depended on accumulating a certain number of hours worked in the period before unemployment.[11] Similarly, a worker must accumulate 40 quarters of work credits to be eligible for full Social Security benefits.[12] Further, benefits under Unemployment Compensation and Social Security are indexed to the wages earned by the worker before benefit application.[13] Thus, Mr. Meštrovac's eligibility for benefits and the benefits to be received under those programs

[11] RCW 50.04.030, RCW 50.04.355.
[12] See CABR Moss' testimony on August 6, 2004, p. 68.

were affected by his loss of work due to his injury.[14]

Second, the benefits in question satisfy the requirements of *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 16 P.3rd 583 (2001), in that they are critical to a worker's health or survival. It is abundantly clear under both the law and the Board Record that benefits from Social Security, Medicare, Industrial Insurance, and Unemployment Compensation provide for basic survival needs. This is demonstrated by:

1) Several decisions by the United States Supreme Court citing the critical nature of these benefits.[15]

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[13] *Ibid.*

[14] See CABR August 6, 2004 transcript, p. 52-53 wherein economist Moss testified that if the employee is "working less and earns less, then he'll receive less benefits." See also testimony at p. 53-4 that if the worker stops working, contributions going into Social Security and Retirement fund "will cease and that will have an effect on his -- the eventual amount of money that that worker will be able to draw" from the program." . . . "There is a certain minimum amount of work required to qualify for benefits under Social Security. . . if Mr. Meštrovac only has a couple of years employment, then he may – may well now not be qualified to receive any Social Security benefits. . . . he has not reached that . . . threshold point . . . in order to qualify for Social Security benefits."

[15] *Goldberg v. Kelly*, 397 U.S. 254, 268-9, 90 S.Ct. 1011, 25 L.Ed.2d 187 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259-260, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974).

2) Testimony before the Board by forensic and labor economist Robert Moss that:

a) These programs ensure basic survival and health care needs for workers and their dependents,[16]

b) Workers receive these governmentally mandated benefits by virtue of employment,[17] and

c) When a worker stops working or works less hours due to industrial injury, the employer stops or makes lower contributions reducing benefits.[18]

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[16] See CABR, Moss' testimony on August 6, 2004 at pp. 39-42 wherein Industrial Insurance is described as "necessary to enable the worker and his family to survive a period when he cannot work [due to industrial injury] and to eventually return him to work, if possible"; at pp. 43-45 wherein Social Security Disability is described as "basic income support to a worker and/or the worker's family when various occurrences take place, either retirement or disability or death of the worker"; at pp. 49-50 wherein it was testified that Unemployment Insurance Compensation "provides basic income support to a worker and family during periods of involuntary unemployment" and wherein Medicare was described as providing "health insurance coverage" to retired workers and workers who "became totally disabled by something other than his work," and at page 73 describing the benefits as providing security "in critical areas. . . or health care to the worker or family"; and at p. 85 saying "The benefits would be either . . . health care or . . . the basic necessities of life for the family.

[17] See CABR Moss' testimony on August 6, 2004 at pp. 52-53 if the employee's "working less and earns less, then he'll receive less benefits."

[18] See CABR Moss' testimony on August 6, 2004 at pp. 53-4 that if the worker stops working, then contributions going into Social Security and Retirement fund "will cease and that will have an effect on his -- the eventual amount of money that that worker will be able to draw" from the program." . . . "There is a certain minimum amount of work required to qualify for benefits under Social Security. . . if Mr. Meštrovac only has a couple of years employment, then he may – may well now not be qualified to receive any Social Security benefits. . . . he has not reached that . . . threshold point . . . in order to qualify for Social Security benefits."], [

3) Evidence that the employer provided competitively induced additional employee benefits to supplement the safety net programs that only provide for bare essentials.[19] [20]

Finally, the court should not be misled by the Department's description of employer's payments as "taxes." Whether benefit payments are mandated by the government, required by a collective bargaining agreement, or made voluntarily, the fact remains that these payments purchase something of value for the worker.

Why the employer makes these payments is of no consequence, nor is it of consequence whether the worker is eligible for the benefits at the time of injury (as shown by *Granger*). The only question is this: Are the benefits provided by the employer's payments critical for the worker's health or survival? The answer is clearly "yes."

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[19] See CABR, Admitted Exhibit 13 [WE Health Care Program], Admitted Exhibit 4 [WE Dental Care Program], Admitted Exhibit 15 [Hartford policy for Supplemental Life, Accidental Death/Dismemberment and Supplemental Dependent Life Insurance], Admitted Exhibit 16 [Hartford policy for Short Term Disability Insurance], Admitted Exhibits 17 & 31 [401(k) Retirement Savings Profit Sharing Plan], Admitted Exhibit 19 [Flexible Benefit Plan]; Moss testimony August 6, 2004, at pp. 35 & 55-65.

C. ATTORNEY'S FEES SHOULD BE AWARDED IF MR. MEŠTROVAC PREVAILS ON ANY ISSUE.

The Department asserts – without authority -- that Mr. Meštrovac is not entitled to an award of attorney's fees on appeal, regardless of this court's decision. According to the Department, even if this court agrees with Mr. Meštrovac on either the interpreter expenses issue or any wage calculation issue, no attorney's fees should be awarded in the court below or "at this level either." See the Department's Brief in Reply and in Response, at p. 48.

The Department is flatly wrong. Its assertion ignores the "unitary claim" theory adopted by the Supreme Court in *Brand v. Department of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999). Under *Brand*, an injured worker who prevails on any issue is entitled to attorneys fees in the superior court and at the appellate court level. The court stated (at 668):

> The Legislature amended RCW 51.52.130 to strengthen the purpose of providing representation for injured workers by allowing attorney fees

[20] BR Admitted Exhibits 8 & 9, pp. 117, 120, 123, 125, & 126.

> awards at the appellate court as well as the superior court....(emphasis added.)

The court further stated (at 670):

> By the plain language of RCW 51.52.130, a worker who obtains reversal or modification of the Board's decision and additional relief on appeal is entitled to an award of attorney fees. Consistent with the plain language of RCW 52.52.130, its underlying purpose, and the entire Industrial Insurance Act's statutory scheme, attorney fees awards under RCW 51.52.130 should not be reduced in light of the total benefits obtained by the worker ***nor should the attorney fees be limited to fees generated from the worker's successful claims.*** [Italics and emphasis added]

Based on *Brand, supra,* there can be no doubt that if this court rules in favor of Mr. Meštrovac on any issue, he is entitled to an award of attorney's fees for work on all issues in both the superior court and the court of appeals.

III. CONCLUSION

For the reasons stated above, this court is respectfully requested to reject the arguments made by the Department in response to Mr. Meštrovac's cross-appeal and to grant the relief requested in his opening brief.

Respectfully submitted this 1st day of May, 2007.

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